A

SUNRISE MEGAWAY SDN BHD (IN LIQUIDATION) v. KATHRYN MA WAI FONG

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
HADHARIAH SYED ISMAIL JCA
B GUNALAN MUNIANDY JCA
[CIVIL APPEAL NO: B-02(A)-1078-06-2019]
18 MARCH 2021

C ***COMPANY LAW:*** *Winding up – Proof of debt – Liquidator admitted proof of debt – Whether liquidator carried thorough and independent investigation – Whether applied correct accounting principles – Whether proof of debt substantiated – Whether claim could be sustained – Whether there was sufficient documentary evidence to back up claim – Whether liquidator justified in admitting proof of debt – Companies Act 2016, s. 517*

D The appellant, a company within the WTK group of companies ('WTK Group'), was wound up pursuant to a winding-up petition filed by the respondent. A liquidator was subsequently appointed. As one of the creditors, and part of the WTK Group, Lismore Trading Co Ltd ('Lismore') had lodged a proof of debt ('POD') for a sum of RM4,018,389.88. The E liquidator conducted an investigation by (i) applying accounting principles in matching and examining the bank statements produced by Lismore and the appellant regarding the transactions and discovered that the amount of monies transferred from Lismore to the respondent matched the amount received by the respondent; (ii) requesting for all credit notes/documents F relating to the telegraphic transfers; (iii) examining and checking cheques payments, accounting records, entries in the appellant's ledgers, receipts; and (iv) interviewing the financial controller of the WTK Group to ascertain the trail of how the advancements were made. The liquidator then admitted the POD. At the High Court, the respondent opposed the admission of the POD, G pursuant to s. 517 of the Companies Act 2016 ('encl. 1'). The High Court held in favour of the respondent and allowed encl. 1; the decision of the liquidator in admitting the POD was reversed. In his findings, the High Court Judge ('HCJ') was of the opinion that (i) the liquidator failed to carry out more investigations for production of the company's written resolution to support their claims; (ii) there was no proof that the monies were received H from Lismore; and (iii) the POD was unsubstantiated and the claim could not be sustained as there was insufficient documentary evidence to back up the claim that Lismore advanced the sum of RM4,018,389.88. Hence, the present appeal.

I

Held (allowing appeal with costs)
Per Kamaludin Md Said JCA delivering the judgment of the court:

(1) It was not for the court to determine how the investigation was to be done or carried out by the liquidator and the relevancy and adequacy of the documents to be considered in his investigation before he makes his finding and decision as, otherwise, the court would be seen as usurping the function of the liquidator or interfering with the conduct or decision of the liquidator in discharging his role and function in company liquidation. The matter was within the statutory powers of the liquidator unless he had failed to carry out investigations or his conduct was so unreasonable and absurd that no reasonable person would so act or had acted in bad faith. (para 30)

(2) The liquidator had conducted a thorough and independent investigation on the POD based on the documents relied on by him, which the HCJ failed to appreciate. The particulars of his investigation were also documented. The HCJ's findings were made based on a misunderstanding of facts and evidence adduced, which led to a conclusion contrary to solid contemporaneous documentary evidence. The purported advances of monies indeed took place. The liquidator applied the correct accounting principles towards the transaction documents and contemporaneous evidence of the appellant before allowing the POD. (paras 34, 36, 39)

(3) The relationship between the subsidiaries in the WTK Group was a relevant factor in proving the said sum was an advancement. The lack of a directors' resolution did not mean that such an advancement could not be made. The liquidator was justified in admitting the POD in the sum of RM4,018,389.88. The decision of the HCJ was set aside and the decision by the liquidator, in admitting the POD, was reinstated. (paras 42, 44 & 54)

Case(s) referred to:
Andrew Christopher Chuah Choong Eng Chuan v. Ooi Woon Chee & Anor [2007] 2 CLJ 405 CA ***(refd)***
Barnden (in his capacity as liquidator of Masonry Works Pty Ltd) (in liq) [2020] FCA 545 ***(refd)***
Fustar Chemicals Ltd (Hong Kong) v. Liquidator of Fustar Chemicals Pte Ltd [2009] 4 SLR 458 ***(refd)***
Lim Chiew v. Lee Chao Yong & Anor And Another Appeal [2018] 1 LNS 1025 CA ***(refd)***
Re Edennote Ltd; Tottenham Hotspurs PLC and Others v. Ryman and Another [1995] 2 BCLC 248 ***(refd)***
Re Equity Funds of Australia (in Liq) [1976-1977] 2 ACLR 238 ***(refd)***
Tan Kim Tian & Anor v. Tan Kim Chuan & Anor And Another Appeal [2020] 1 LNS 15 CA ***(refd)***
Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & Ors [1995] 3 CLJ 493 FC ***(refd)***
Wong Sin Fan & Ors v. Ng Peak Yam & Anor [2013] 3 CLJ 17 FC ***(refd)***

Legislation referred to:
Companies Act 1965 (repealed), ss. 279, 291(1)
Companies Act 2016, s. 517
Companies (Winding-up) Rules 1972, rr. 91, 92, 93, 98

For the appellant - Gopal Sri Ram, Wong Rhen Yen, Gary Ng Cheng Yip, Lee Min Lun & How Li Nee; M/s Dennis Nik & Wong
For the respondent - Kelvin Seet Wan Nam & Dennis Yuean Jin Han; M/s Chooi & Company + Cheang & Ariff

[Editor's note: Appeal from High Court, Shah Alam; Post-winding-up No: BA-28PW-150-11-2018 & Companies (Winding-up) No: BA-28NCC-462-10-2016 (overruled).]

Reported by Najib Tamby

JUDGMENT

Kamaludin Md Said JCA:

Introduction

[1] The appellant appeals against the decision of the High Court which allowed the respondent's motion to reverse the decision of the appellant's liquidator in admitting the proof of debt submitted by Lismore Trading Sdn Bhd.

Brief Facts

[2] The appellant is a company within WTK group of companies ("WTK group") in the business of extraction and sale of logs. On 28 May 2018 the appellant was wound-up by the winding-up court ("winding up order") pursuant to a winding up petition filed by the petitioner. Upon the winding-up order, Mr Wong Ching Yong was appointed as the liquidator. The petitioner is the executrix of the estate of the late Datuk Wong Kie Nai ("WKN") and she holds 80,000 ordinary shares in the appellant.

[3] As one of the creditors and part of the WTK Group, Lismore Trading Co Ltd ("Lismore") had on 27 August 2018 lodged a proof of debt ("POD") for a sum of RM4,018,389.88 through Messrs Huang & Company Advocates. The liquidator admitted Lismore's POD through a notice of admission dated 1 November 2018. On 22 November 2018, the respondent filed encl. 1 to oppose the admission of Lismore's POD by the liquidator.

[4] After hearing the respondent's motion and the appellant's replies and having considered the arguments, the learned High Court Judge was inclined to agree with the respondent, hence, allowed the said motion to reverse the decision of the appellant's liquidator in admitting the Lismore's POD.

The Appeal

[5] We heard oral submissions from Datuk Sri Gopal Sri Ram on behalf of the appellant and Mr Kelvin Seet Wan Nam for the respondent. Counsels are also relying on their written submissions.

[6] In essence, the appellant's case is that the High Court's decision should be reversed based on four reasons as follows:

(i) the High Court failed to judicially appreciate and/or to draw proper inferences from the documentary evidence produced before it;

(ii) the High Court failed to take into account relevant considerations which the appellant's liquidator had taken in admitting Lismore's POD;

(iii) the High Court failed to judicially appreciate Madam Loh Leh Fong's evidence; and

(iv) the respondent failed to meet the threshold test by failing to produce any contemporaneous evidence to the contrary in the High Court.

[7] There are several authorities referred to by the appellant and most importantly, the principle of law expounded by the Federal Court in *Wong Sin Fan & Ors v. Ng Peak Yam & Anor* [2013] 3 CLJ 17; [2013] 2 MLJ 629, which set out the threshold test that the court should be slow to interfere with any act or decision of the liquidators in discharging their roles in company liquidation and will do so only if it is so unreasonable and absurd that no reasonable person would have acted in that way. The court will not interfere with the decision simply because its opinion might differ from that of the liquidator.

[8] In the present case, the liquidator has taken into account relevant considerations before admitting Lismore's POD. Counsel for the appellant submitted that the liquidator's conduct cannot be held as so unreasonable and absurd that no reasonable person would have acted in that way. In the circumstances, the learned High Court Judge has committed a serious error of law and misdirected himself. This court was urged to intervene to correct the decision and it was prayed that the appeal be allowed.

[9] The respondent argued that those reasons given by the appellant's counsel are without merit. The respondent says that the High Court's decision is correct by reason that from the liquidator's purported examination of the POD it is palpable that the claim in the POD is questionable and doubtful. The POD submitted by Lismore is essentially a bare claim not substantiated with supporting documents and/or any sufficient documentary proof. The liquidator has failed to take into account any of the above important considerations before admitting the POD. This failure makes his decision unsustainable. The bank statement purportedly shown by Lismore also does not show that the sums were received by the

appellant. Madam Loh Leh Fong @ Loh Leh Pong Fong is not in a position to speak on behalf of Lismore because she is neither an officer of Lismore nor the person responsible for the accounts and finance of Lismore. Madam Loh Leh Fong @ Loh Leh Pong Fong's evidence that the appellant is in fact indebted to Lismore is not a reliable evidence. The liquidator has admitted Lismore's POD without proper reasons and justification. Hence, the decision is correct. The respondent prays that the appeal ought to be dismissed.

[10] After hearing the oral submissions from the appellant's and the respondent's counsels and having read the records of appeals and the grounds of judgment of the learned judge and considered the arguments advanced in the submissions, we are satisfied that based on the principles of law and the authorities cited to us that the High Court had erred in law and fact in interfering with the act or decision of the liquidator in admitting the proof of debt by Lismore.

[11] The High Court Judge had failed to duly and judicially appreciate the totality of evidence and had wrongly concluded the decision of the liquidator was so unreasonable and absurd that no reasonable person would have acted in that way.

[12] We agree with the appellant's contention that in view of the evidence as a whole before the High Court, the liquidator has satisfactorily and adequately performed his statutory role and function by considering all the evidence, particularly the unchallenged documentary evidence and came to a decision that was reasonable and justified under the circumstances relating to the admission of the impugned POD.

[13] We, therefore, find appealable errors by the High Court Judge that warrant appellate intervention. Accordingly, our unanimous decision is to allow the appellant's appeal with costs and set aside decision of the High Court. The decision of the liquidator is reinstated.

[14] We provide our reasons.

The Law

[15] In the notice of motion, the respondent sought to reverse the liquidator's decision in admitting the Lismore's POD. The application is made under s. 517 of the Companies Act 2016 (previously s. 279 of the Companies Act 1965 and/or rr. 91, 93 & 98 of the Companies (Winding-up) Rules 1972.

[16] Section 279 of the Companies Act 1965 allows the respondent being a person aggrieved by any act or decision of the liquidator to appeal against such decision of the liquidator to the court. The court may confirm, reverse or modify the act or decision complained of and make such order as it thinks just.

[17] Section 291(1) of the Companies Act 1965, provides that all debts payable on a contingency and all claims against the company present or future shall be admissible to proof against the company.

[18] By r. 92 of the Companies (Winding-up) Rules 1972 the liquidator shall examine every proof of debt lodged with him and the grounds of the debt, and shall in writing admit or reject it, in whole or in part, or require further evidence in support of it. If he rejects a proof he shall state in writing in Form 59 to the creditor the grounds of the rejection.

[19] The Federal Court in *Wong Sin Fan & Ors v. Ng Peak Yam & Anor* [2013] 3 CLJ 17; [2013] 2 MLJ 629, approved the decision of the Court of Appeal in *Andrew Christopher Chuah Choong Eng Chuan v. Ooi Woon Chee & Anor* [2007] 2 CLJ 405; [2007] 2 MLJ 12 and held that that the court should be slow to interfere with any act or decision of the liquidators in discharging their roles in company liquidation and will do so only if it is so unreasonable and absurd that no reasonable person would have acted in that way. The court will not interfere with the decision simply because its opinion might differ from that of the liquidator.

[20] More recently, the Court of Appeal in *Lim Chiew v. Lee Choa Yong & Anor And Appeal* [2018] 1 LNS 1025; [2018] MLJU 956, had reaffirmed the position of law on the test to be applied under s. 279 of the Companies Act 1965 following *Wong Sin Fan & Ors v. Ng Peak Yam & Anor* (*supra*), the Federal Court in affirming the decision in *Andrew Christopher Chuah Choong Eng Chuan v. Ooi Woon Chee & Anor* (*supra*). In this case, at para. 52, the learned High Court Judge found that she had to interfere with the exercise of the liquidator's decision based on the following grounds:

(a) the liquidator did not address himself to the correct questions;

(b) the liquidator has made errors of law;

(c) the liquidator has taken into consideration entirely irrelevant considerations.

On appeal, the Court of Appeal held that the liquidator's conduct did not fall into any of the specified grounds from (a), (b) and (c) as cited by the learned judge in para. 52 above. The court does not think that it could be said that the conduct of the liquidator was so unreasonable and absurd that no reasonable person would have so acted. Our decision was arrived based on the settled principles that the court should be slow to interfere with any act or decision of the liquidators in discharging their roles in company liquidation unless shown that no reasonable person would have acted in that way. The court will not interfere with the decision simply because its opinion might differ from that of the liquidator.

[21] With the established and entrenched legal principles cited above, we have to determine whether the High Court was justified in interfering with the conduct or decision of the liquidator in discharging his role in company

liquidation (the appellant) or whether the act or decision of the liquidator is so unreasonable and absurd that no reasonable person would have acted in that way or whether the liquidator failed to address the right questions or at all or to consider relevant matters in admitting the POD (Lismore's POD).

The High Court's Decision

[22] The learned High Court Judge had referred to the relevant laws applicable to deal with the liquidator's act or decision in discharging his roles in company liquidation for guidance.

[23] In allowing the respondent's motion and reversing the appellant's liquidator decision in admitting Lismore POD, the High Court gave its reasons as follows:

> (2) The POD is unsubstantiated and the claim cannot be sustained as there were insufficient documentary evidence to back up the claim that Lismore had advanced the sum of RM4,018,398.88 to the respondent. To me, the liquidator should not have ignored the fact that there were lack of supporting documents. The failure on the part of the liquidator to ascertain the genuineness of Lismore's claim (due to the non-production of material documents by Lismore) clearly shows that he had wrongly exercised his discretion to admit Lismore's POD.
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> (3) Loh Leh Fong @ Loh Leh Pong in her affidavit affirmed on 3/1/2019 said that she is the Financial Controller of WTK Management Services Sdn Bhd. Her job is to oversee the account and finances of a few companies under the WTK group of companies which include the respondent. Prior to the admission of Lismore's Proof of Debt on 1/11/2018, the liquidator had called her for interviews and examination few times regarding the said POD at his office. Finally, Loh Leh Fong she believe that the respondent is indebted to Lismore in the sum of RM 4,018,389.88 based on the fact that Lismore had advanced by way of telegraphic transfer from Singapore several times to respondent RHB Bank's account in Malaysia between 21/10/2011 to 22/12/2011 for the purpose of disbursing the advances money to Artic Star. Then, after receiving the money, respondent would disbursed the funds to Artic Star by way of cheque. There were altogether twelve (12) cheque issued in the sum of RM4,018,389.88. All such payment were duly acknowledged receipt by Artic Star with official receipts issued to the respondent.
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> (4) The affidavits affirmed by the liquidator dated 3/1/2019 stated that as the POD of the respondent was already admitted by Artic Star, then the liquidator would then have to refund the same to Lismore as the money does not belong to the respondent. However, with regret, I cannot agree with the liquidator's argument. Based on the affidavit evidence of the parties, it can be clearly shown that Loh Leh Fong @ Loh Leh Pong is not the financial controller of Lismore nor was she responsible for the accounts and finance of Lismore. As such, the claim by her that the respondent is indebted to Lismore is entirely questionable and not reliable.

(5) According to Loh Leh Fong @ Loh Leh Pong affidavit at paragraph 10(b) she was then informed by the late Datuk Wong Kie Nai that there will be few advances made from Lismore to Artic through the respondent. Lismore then advanced by way of telegraphic transfer from Singapore several times to the respondent's for the purpose of disbursing the advances money to Artic Star later. To me, if such kind of transaction is true, then the liquidator should have carried out more investigations by asking the said financial controller to provide the company's written resolution. More so when the sum involved is very substantial. Unfortunately, this was not done by the liquidator. Neither was there any loan agreement produced by the financial controller to support their claims. Without all the material documentation proven in court, can it be said that the liquidator has exercised his discretion rightly in accepting Lismore's POD. In the absent of these relevant and important documents, I am in to hesitation to conclude that the liquidator has not exercised his discretion *bona fide* and he has acted in a way in which no reasonable liquidator would have acted. It is my considered view that the liquidator has made errors of law. He did not address the relevant questions. He has also failed to consider the relevant factors when admitting the POD which warranted this Court to interfere with the exercise of his decision.

Before concluding, there was one interesting point taken by the petitioner which I need to mention. Learned counsel for the petitioner argued that the series of alleged telegraphic transfer of money involved three (3) companies i.e. Lismore, the respondent and Artic Star do not prove that Lismore advanced monies to Artic Star through the respondent. The monies transferred to the respondents could have well been repayment of amount owing by Lismore to the respondent. Moreover, it is odd that if indeed Lismore had wanted to advance monies through the respondent. This alleged advance arrangement does not make any commercially sense.

Furthermore, it was also contended by the petitioner that the respondent's Directors Report and Audited Financial Statements for the financial year ended 30/6/2012 (Exhibit KM – 15, page 15) do not show that the respondent is indebted to Lismore for the sum RM 4,018,389.88.

[24] In short, the High Court interfered with the liquidator's decision to admit Lismore's POD for the reason that the liquidator had wrongly exercised his discretion by failing to ascertain the genuineness of Lismore's claim. Madam Loh Leh Fong @ Loh Leh Pong's evidence that the respondent is indebted to Lismore is entirely questionable and not reliable. The liquidator failed to carry out more investigations such as the production of the company's written resolution and loan agreement to support their claims and finally, the liquidator has not exercised his discretion *bona fide* but has acted in a way in which no reasonable liquidator would have acted. Therefore, the liquidator has made errors of law for failing to address the relevant questions.

Our Decision

[25] It is not disputed that in the grounds of judgment the learned High Court Judge acknowledged the liquidator had relied on the following evidence in admitting Lismore's POD. These documents were exhibited in the liquidator's affidavit and submitted before the court and the documents are as follows:

(i) Lismore's POD and Lismore's bank statement;

(ii) appellant's bank statement;

(iii) appellant's POD to Artic Star;

(iv) notice of dividend by Artic Star's liquidator (admission of the appellant's POD;

(v) the credit advice/swift message from RHB Bank Bhd;

(vi) appellant's debtors ledger; and

(vii) appellant's journal vouchers (see ACB, Tab 12, pp. 92 to 93);

(collectively, "the said documentary evidence").

[26] Despite all the evidence submitted by the appellant, the court held that for the advanced monies to and received by the appellant, there was no proof that can be shown that the money were received from Lismore. It is also held that the POD is unsubstantiated and the claim cannot be sustained as there were insufficient documentary evidence to back up the claim that Lismore had advanced the sum of RM4,018,398.88 to the respondent. Learned counsel for the appellant submitted that these findings were erroneous. There was sufficient contemporaneous documentary evidence to establish the money trail of RM4,018,398.88 advanced by Lismore to the appellant.

[27] The learned High Court Judge dealt with the bank statement which shows that the sums of RM983,200, RM1,161,595, RM971,995 and RM901,599.88 were received by the respondent but held that there was no proof that can be shown that the monies were received from Lismore. These two documents were enclosed in the Lismore's POD Form dated 27 August 2018 which shows the total amount of RM4,018,398.88, ie, *vide* the Lismore's summary account dated 12 July 2018 and its statement of account from October 1 to October 31, 2011.

[28] We agree with the learned High Court Judge that admitting Lismore's POD based on the two documents merely on the face of them without further investigation is insufficient. Based on the two documents, the learned High Court Judge went on to say that the liquidator should not have ignored the fact that there was a lack of supporting documents and the liquidator should ascertain the genuineness of Lismore's claim (due to the non-production of material documents by Lismore). His finding was that the liquidator had erroneously exercised his discretion to admit Lismore's POD.

[29] However, the learned High Court Judge did not mention or address in his judgment what he meant by non-production of material documents. However, it can be understood that the learned High Court Judge was referring to any loan agreement that should have been produced by the financial controller to support the claims and without all this material documentation admitted into evidence it cannot be said that the liquidator has exercised his discretion rightly in accepting Lismore's POD. The learned judge also found that the liquidator failed to carry out more investigations for production of the company's written resolution to support their claims.

[30] We did not agree with this finding simply because, in our view it is not for the court to determine how the investigation is to be done or carried out by the liquidator and the relevancy and adequacy of the documents to be considered in his investigation before he makes his finding and decision as otherwise, the court will be seen as usurping the function of the liquidator or interfering with the conduct or decision of the liquidator in discharging his role and function in company liquidation. The matter is within the statutory powers of the liquidator unless he had failed to carry out investigations or his conduct was so unreasonable and absurd that no reasonable person would so act or has acted in bad faith.

[31] The respondent argued that Lismore's purported POD was merely a bare claim containing a self-serving statement of account with nothing more. The POD is unsubstantiated with crucial supporting documents to prove that there was indeed a loan or advance agreement in place. There was no explanation whatsoever of the nature of the alleged debt in the purported POD. This casts serious doubts as to the genuineness of the POD. The learned judge has found that the liquidator failed to carry out more investigations.

[32] Lismore submitted its POD claim form on 27 August 2018 enclosing the summary statement of account and bank statement of account. The liquidator admitted Lismore's POD on 1 November 2018. Prior to the decision, the liquidator had a meeting on 1 October 2018 attended by the creditors, including the appellant and the respondent, to discuss the PODs received by the appellant. The respondent objected to Lismore's POD. The liquidator asked for 28 days to reply to all creditors on admission/rejection of the respective PODs permitted under the rule. The meeting unanimously agreed to form a Committee of Inspection ("COI") of the PODs. Mr Danny Huang Dung Po, the representative of Lismore and other creditors' representatives including the respondent were appointed as members of the COI. The liquidator had also requested the legal counsel to give a legal opinion on the time-bar issue of the POD's claim. The decision to admit Lismore's POD was made within the 28 days from the time he received the POD.

[33] The liquidator in his affidavit dated 3 January 2019, stated that he obtained copies of both the Lismore's HSBC Bank statements (Singapore account) and the appellant's RHB Bank (Malaysia) bank statement in relation to the transactions in issue. There are also other documents exhibited in the affidavit referred by him. Beyond that, the liquidator had interviewed Madam Helen Loh during examination of Lismore's POD. By the explanation and the documents in the liquidator's affidavit, we are satisfied that based on the documentary evidence, his investigation reveals that the bank statements and credit notes tally with the accounting records of the appellant. The relevant transactions between Lismore, the appellant and Artic Star were captured and reflected in the appellant's RHB bank statement. The said documentary evidence proved that there were indeed advances of monies made among the parties. The transfers of monies were made instantaneously between parties and the transactions as well as the sum of monies involved were identical. It was clear to us that he has done investigation to ascertain the genuineness of Lismore's claim. In our view, the sufficiency of his investigation before making any decision to admit or reject the POD is entirely his own function and not the court.

[34] The liquidator has done his investigations on Lismore's POD based on the documents relied on by him. In our view, the learned High Court Judge failed to appreciate all the said documentary evidence. The court's finding that there was no proof that can be shown that the monies were received from Lismore and that the POD is unsubstantiated and the claim cannot be sustained as there was insufficient documentary evidence to back up the claim that Lismore had advanced the sum of RM4,018,398.88 was made based on a misunderstanding of facts and evidence adduced before it, which led the court to come to a conclusion contrary to solid contemporaneous documentary evidence.

[35] In the case of *Lim Chiew v. Lee Chao Yong & Anor And Another Appeal* [2018] 1 LNS 1025; [2018] MLJU 956, the Court of Appeal acknowledged the liquidator's findings and found that it would not be right for the High Court Judge to interfere with the same because the liquidator had produced documentary evidence:

> *[49] Therefore, the learned Judge's finding that the genuineness of Lim Chiew's claim cannot be sustained since the liquidator only relied on the statement of claim in Suit 123 as proof of his alleged debt, is thus erroneous since she has ignores documentary evidence produced by the liquidator. Investigation was done by the liquidator and particulars of his investigation were well documented.* As can be seen in his affidavit at para 8.4 referred to in paragraph 48 above, he took into consideration that the petitioner Lim Chiew has made various payments by cheques to the respondent Siteman amounting to RM7,500.000 and these payments by cheques are exhibited in exhibit 'S4'. (emphasis added)

[36] We found the above case strongly supports the appellant's appeal in that the said documentary evidence was obtained by the appellant's liquidator through an independent and thorough investigation. The

particulars of his investigation were also documented. Similarly, the court below did not judicially appreciate the said documentary evidence which carries a high probative value.

[37] In the case of *Barnden (in his capacity as liquidator of Masonry Works Pty Ltd) (In liq)* [2020] FCA 545 cited by the appellant's learned counsel, at para. 14, it was held that the liquidator of Masonry Works Pty Ltd (company in liquidation) was justified in admitting to proof on the liquidation of the company the claim by Masonry Profiles Pty Ltd (in liquidation) in an amount of $505,942.77 as there was a detailed and thorough investigation which had formed the basis of the liquidator's determination. It was held that:

> [14] The liquidator has conducted thorough investigations into the discrepancy of the loan amount. Those investigations included:
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> (1) examining the financial records of the company and Profiles;
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> (2) reviewing the general ledgers of each of the company and Profiles;
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> (3) reviewing bank statements for each of the company and Profiles; and
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> (4) Identifying and reconciling mutual debits and credits between the company and Profiles from the ledgers and accounts.
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> [15] There is no loan agreement or other document recording the terms of the loan from Profiles to the company. The liquidator has been able to identify reciprocal debits and credits for 51 transactions between the companies on the period 2 January 2013 to 31 August 2014. Five of these are supported by bank statements.

[38] The *Barnden* case (*supra*) is in all fours with the present case. In summary, the investigations conducted by the appellant's liquidator before admitting Lismore's POD are as follows:

(i) applying accounting principles in matching and examining the bank statements produced by Lismore and appellant regarding the transactions. The amount of monies transferred from Lismore to the respondent matched the amounts received by respondent in its RHB bank account in 2011;

(ii) by requesting for all credit notes/documents relating to the telegraphic transfers to support the admission of the POD;

(iii) by examining and checking the alleged 12 cheques payments made by the respondent to Artic Star as advances from Lismore;

(iv) by examining the relevant accounting record of the respondent such as the general ledger which shows that the 12 advances to Artic Star were duly recorded;

(v) by examining the appellant's POD that was already admitted by Artic Star, and in the event Artic Star pays the said sum either in full or in *pari passu* to the respondent;

(vi) by examining and reconciling the entries in the appellant's ledger that shows receipts of the advances from Lismore;

(vii) by reviewing the admission of the appellant's POD by Artic Atar's liquidator, one Mr Lim San Peen from PWC; and

(viii) by interviewing the financial controller of the WTK Group, one Madam Loh Leh Fong to ascertain the trail of how the advancements were made.

(collectively, "the said investigations")

[39] We are satisfied that the purported advances of monies indeed took place. The appellant's liquidator came to his decision after the said investigations. The liquidator had applied the correct accounting principles toward the transaction documents and contemporaneous evidence of the appellant before allowing Lismore's POD. In our considered view, the learned High Court Judge was wrong in his findings that the appellant's liquidator had ignored the fact that there were lack of supporting documents and that there was a failure on the part of the liquidator to ascertain the genuineness of Lismore's claim.

[40] The liquidator in discharging his role in the present company liquidation was equipped with the necessary qualification, skill and ethics. We agree with the respondent that the duty of the liquidator was to act impartially and to draw the attention of the court to facts and matter which were material for the court's consideration. This was held in the Federal Court case of *Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & Ors* [1995] 3 CLJ 493; [1995] 2 MLJ 709 where the Federal Court was critical when the trial judge had relied on the liquidator who, seemed to have sided with the respondent where the liquidator had failed to consider the appellant's right, ie, her right to share in the company surplus assets. Mohamed Dzaiddin FCJ (as he then was) observed at p. 719 that the liquidator should maintain an even and impartial hand between all individuals whose interests are included in the winding up. He should have no leaning for or against any individual whatsoever. We agree with the view that a person who holds the status of liquidator, or any persons or it's like, whether or not appointed by court, for reward, has a high standard to meet. The court will interfere with the decision of the liquidator when the circumstances or the facts warrant it such as the present.

[41] However, the circumstances or the facts do not warrant it in the present scenario. In fact, we are guided by the Singapore Court of Appeal case of *Fustar Chemicals Ltd (Hong Kong) v. Liquidator of Fustar Chemicals Pte Ltd* [2009] 4 SLR 458, at pp. 468-469 (ABOA, Tab 5) which held as follows:

Although a liquidator "is not bound to admit" any proof of debt which, if admitted, would affect the interests of creditors and contributories, he is only bound to take extraordinary steps to scrutinize a proof of debt on the basis that it could be a false claim in cases where he has reason to be suspicious about its genuineness or legal validity. *Factors to be considered include*, *inter alia*, *the origins of the debt, the length of time the debt has been due, how the company has treated the debt in its financial statements, the business of the debtor company and, where relevant, the relationships between the claimants and the controlling shareholders of the company*. In assessing these factors, the liquidator must rely on: *(a) knowledge of the general principles of company accounting; (b) the auditing practice of companies by independent auditors; (c) the effect and implication of directors' and shareholders' approvals annually of company accounts made in compliance with the law; (d) the customary insolvency practice in verifying debts; and (e) some degree of common sense in understanding human relationships*. In taking into account these matters, he should also apprise himself of the nature of the business of the company, and other facts peculiar to the company in liquidation. *In the case of the present company, the relationship between the directors and the shareholders, inter se, is obviously a relevant factor to be considered*.

[21] *Therefore, although a liquidator has a duty to scrutinize all proofs of debt, the level of scrutiny required by the liquidator to discharge this duty must, in the final analysis, depend on the circumstances of the case*. In the present case, OSH rejected FCL's proof only because it could not produce the related primary documents, even though FCL had explained that they had been destroyed or lost due to effluxion of time. This was not an unbelievable reason since the claimed debt was originally acknowledged by the company as far back as January 1995, more than nine years before the company was wound up. OSH was aware that under Hong Kong law, FCL was not obliged to preserve indefinitely the related documents concerning a debt due to the company (which is, in any case, from a related company or at least part of a group of companies controlled by NCL and his family). OSH was also aware that FCL's proof of debt was a debt that the company itself had consistently acknowledged as owing in its own annual accounts, which had been approved by the WSW *qua* director and shareholder. In our view, although a liquidator has the power to look behind the audited financial statements and audit confirmations, a creditor's proof of debt should not be lightly rejected if the debt has been consistently acknowledged in audited accounts and or through audit confirmation statements. Such acknowledgments amount to an admission of the debt. Furthermore, a long effluxion of time inevitably creates evidential difficulties, as in the present case. Witnesses may be difficult to locate or may not be able to recollect essential details, and some may even become uncooperative. The relevant primary documents can also be destroyed or lost through the passage of time. In essence, while we accept that the burden of proof ordinarily rests on the creditor to substantiate a proof of debt this does not mean that the only means by which a creditor can prove a proof of debt must be through the production of primary documents. (emphasis added)

[42] We agree with the appellant that in this case the relationship between the subsidiaries in the WTK Group is a relevant factor in proving that the said sum is an advancement. The lack of a director's resolution does not mean that such an advancement cannot be made. In any event, transactions of monies advanced were reflected in contemporaneous documents and it is undeniable that monies advanced were transmitted to Artic Star through the appellant. Further, we agree that the admission of the appellant's POD by Artic Star's liquidator is undeniable proof of the existence of the arrangement for such an advancement by Lismore and this was not denied nor disputed by the respondent.

[43] Following the principles in *Fustar* (*supra*) and *Barnden* (*supra*) alluded to earlier, Artic Star's liquidator (similar to the appellant's liquidator) had a duty to scrutinise the appellant's POD judiciously. With respect, the admittance of the appellant's POD can only mean that Lismore's POD ought to be admitted. It is also pertinent to note that the respondent had not added Artic Star or Lismore as a party in her application to reverse the appellant's liquidator's decision. We find it is strange for the High Court not to rule that the respondent's action in not disputing the admission of the appellant's POD by Artic Star amounts to an admission and knowledge of such advancement.

[44] In the circumstances, we find that the liquidator had conducted a thorough and sufficient investigation and exercised his discretion correctly in admitting Lismore's POD. We are also satisfied that the liquidator is justified in admitting the claim by Lismore in the sum of RM4,018,389.88 following a detailed and thorough investigation.

[45] Another plain error committed by the learned High Court Judge is when he held that Madam Loh Leh Fong @ Loh Leh Pong is not the financial controller of Lismore nor was she responsible for the accounts and finance of Lismore. As such, the claim by her that the respondent is indebted to Lismore is entirely questionable and not reliable. The learned judge, in our view, clearly failed to appreciate the evidence provided by Madam Loh on the practices of appellant, Lismore and Artic Star as part of the WTK Group. Therefore, the finding by the learned High Court Judge that Madam Loh evidence was entirely questionable and not reliable in our view is without basis.

[46] The averments in Madam Loh's affidavit dated 3 January 2019 reveal that Madam Loh had been working with WTK group for the past 29 years; that she was promoted to financial controller in year 2007; that her duties were to oversee the accounts and finance of several companies of WTK Group including the applicant, Lismore and Artic Star. The learned judge had failed to consider these facts. Further, Madam Loh had previously supervised the accounts of the appellant and worked under the late WKN. She therefore had personal knowledge of the nature of the arrangement as to why the said RM4,018,389.88 was transferred to the appellant in 2011, ie,

to be further advanced to Artic Star. According to Madam Loh, the financial controller of some of the companies under the WTK Group (including the appellant), Artic Star was in need of capital for its plantation business in 2011.

[47] The facts reveal that the appellant and Arctic Star were all run by and/or connected to the WTK's family as part of the WTK Group. We agree with the appellant's contention that it is not uncommon for an arrangement for the advancement of monies to be made among the entities. In our considered view, the lack of written resolutions or written agreements does not mean that such an arrangement is improper as held in *Barnden*. Had the learned High Court Judge judicially appreciated Madam Loh's affidavit evidence, he would not have arrived at his finding on Madam Loh's credibility.

[48] The learned High Court Judge has made a conclusion that the appellant's liquidator "has not exercised his discretion *bona fide* and he has acted in a way in which no reasonable liquidator would have acted", and that he "has made errors of law" and "did not address the relevant questions" as well as "failed to consider the relevant factors". We agree with the appellant and with the reasons given that we have alluded to earlier, that these findings cannot be correct. The appellant's liquidator in fact had acted in accordance with established principles enunciated in *Fustar* and *Barnden*.

[49] We agree with the appellant's submission that the learned High Court Judge did not make any specific findings to support his decision that the appellant's liquidator was wrong to admit Lismore's POD, the reason being that the respondent adduced no evidence to contradict the appellant's contemporaneous documentary evidence. The onus of establishing that a proof of debt was improperly admitted rests on the person who makes this assertion, in this case it is the respondent (see *McPherson's Law of Company Liquidation*, 3rd edn, Sweet and Maxwell, 2013, at p. 12-064, ABOA, Tab 6). In the absence of such evidence to the contrary, surely the learned High Court Judge lacked both factual and legal basis to meet the high threshold test to interfere with the appellant's liquidator's decision to admit Lismore's POD.

[50] The threshold test is that the court should be slow to interfere with any act or decision of the liquidator in discharging his role in company's liquidation particularly in matters involving the admission or rejection of proof of debt which involve commercial considerations. The court can only interfere in very exceptional circumstances when the liquidator has acted in utter unreasonableness.

[51] In *Wong Sin Fan & Ors v. Ng Peak Yam & Anor* (*supra*); Zulkefli Makinudin CJM had this to say at p. 30 (CLJ); p. 639 (MLJ):

> [24] Based on the above principles of law, we are of the view that *the court should be slow to interfere with any act or decision of the liquidators in discharging their roles in company liquidation and will do so only if it is so unreasonable and*

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> *absurd that no reasonable person would have acted in that way*. The court will not interfere with the decision simply because its opinion might differ from that of the liquidator (see the case of *Andrew Christopher Chuah Choong Eng Chuan v. Ooi Woon Chee & Anor* [2007] 2 CLJ 405).
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> (emphasis added)

B See also: *Re Edennote Ltd;* and *Tottenham Hotspurs PLC and Others v. Ryman and Another* [1995] 2 BCLC 248, *Re Equity Funds of Australia (In Liq)* [1976-1977] 2 ACLR 238.

[52] The recent case of *Tan Kim Tian & Anor v. Tan Kim Chuan & Anor And Another Appeal* [2020] 1 LNS 15; [2020] MLJU 86 took a similar approach C as the cases mentioned above. In addition, the Court of Appeal held at para. 31 that:

> [31] The Court will have to see if liquidator's action has such importance and can be seen to have *such defects as to justify the court exercising its supervisory power* where *a defect arising either out of some want of good faith or* D *out of some erroneous approach in law or in principle then that it clearly a ground on which the court would entertain an application by one of the interested parties for appropriate direction or some other form of remedial order*. (emphasis added)

[53] As explained in the above paragraphs, the appellant's liquidator acted in accordance with the principles in *Fustar* and *Barnden*. The respondent also E tendered no evidence to show that the admission of Lismore's POD was made in bad faith or out of some erroneous approach in law. This is a clear-cut case where the respondent is unable to meet the threshold in *Wong Sin Fan & Ors v. Ng Peak Yam & Anor*. Hence, the learned High Court Judge ought not to have interfered with the appellant's liquidator's decision insofar as F Lismore's POD is concerned. Further, in the absence of evidence of fraud or bad faith, there is simply no reason for the learned judge to find that the appellant's liquidator had acted in a manner that was so utterly unreasonable and absurd that no reasonable man would have done it.

Conclusion

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[54] We are satisfied that there are merits in the appellant's appeal. There is a clear misdirection by the learned judge which has occasioned a miscarriage of justice, hence, it warrants this court to interfere and correct the High Court's mistake. It is our unanimous decision that the appeal is H allowed with costs of RM15,000 here and below subject to allocator. The High Court decision is set aside and the decision by the liquidator in admitting Lismore's POD is reinstated.

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